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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD OWEN LANSING,

Defendant and Appellant.

In re RICHARD LANSING,

on Habeas Corpus.

H036212

(Monterey County  
Super. Ct. No. SS091934)

H037901

(Monterey County  
Super. Ct. No. SS091934)

Defendant Richard Owen Lansing appeals a judgment after a jury trial during which he was convicted of assault by means of force likely to cause great bodily injury (Pen. Code, § 245, subd. (a)(1)).<sup>1</sup> On appeal, defendant asserts the trial court erred in ordering the complaining witness be referred to as “Jane Doe” during trial, he was denied effective assistance of counsel by his attorney’s failure to object and request a jury admonition when the prosecutor committed misconduct in closing argument and rebuttal, and the court abused its discretion in failing to dismiss one of defendant’s strike convictions at sentencing.

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<sup>1</sup> All further statutory references are to the Penal Code.

Defendant also submits a petition for habeas corpus based on ineffective assistance of counsel that we ordered consolidated with this appeal.

### **STATEMENT OF THE FACTS AND CASE**

In August 2009, Jane Doe walked to the Salinas transit center. There she met defendant, who referred to himself as “Ricardo.” Doe talked to him for a while and found him nice and attractive.

Doe and defendant walked to a park and sat down to talk. After a while, defendant told Doe he wanted to have sex with her. Doe told defendant she did not want to, and defendant responded that he would have sex with her “no matter what.” Defendant pinned Doe’s shoulders on the ground, and Doe screamed and hit defendant. Defendant began to beat Doe on the face, and stood up and kicked Doe in the ribs. Eventually, a man came over to help Doe, and defendant ran away. In addition, an acquaintance of Doe, Veronica Lopez was nearby when she heard Doe cry for help. Lopez called 911.

When police responded to the scene, they found Doe bleeding heavily from the nose and mouth. They talked to both Doe and Lopez, and believed both smelled like alcohol.

The officers found defendant at the transit center. At a field show-up, Lopez identified defendant as the man she saw attack Doe. The officers arrested defendant and took him to the police station. An officer read defendant his *Miranda*<sup>2</sup> rights, to which defendant responded that he did not understand them. The officer reread the rights to defendant. Following this, defendant asked the officer what he was being charged with, and the officer said, “At the very least, battery.” Defendant said, “At the very most?” The officer replied, “That’s the very least you could be charged with.” Defendant then asked, “What else? Rape?”

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<sup>2</sup> *Miranda v. Arizona* (1966) 384 U.S. 436.

Defendant was charged by information with assault with intent to commit rape (§ 220; count 1), attempted forcible rape (§§ 261, subd. (a)(2), 664; count 2), and assault by means of force likely to cause great bodily injury (§ 245, subd. (a)(1)). The information also alleged defendant had suffered a prior strike conviction and had served three prior prison terms (§§ 1170.12, subd. (c)(2), 667.5, subd. (b)).

Following a jury trial, defendant was acquitted of counts one and two, and was convicted of count three, assault with force likely to cause great bodily injury (§245, subd. (a)(1)). After defendant waived a jury trial, the court found his prior conviction allegations true.

Defendant was sentenced to prison for eight years, and the court denied defendant's motion to dismiss his prior strike conviction.

### **DISCUSSION**

On appeal, defendant asserts the trial court erred in ordering the complaining witness be referred to as "Jane Doe" during trial, he was denied effective assistance of counsel by his attorney's failure to object and request a jury admonition when the prosecutor committed misconduct in closing argument and rebuttal, and the court abused its discretion in failing to dismiss one of defendant's strike convictions at sentencing.

#### ***Victim Identified as "Jane Doe"***

Defendant asserts the trial court erred when it identified the victim as "Jane Doe," during the trial, because there is nothing in the record that shows the victim actually requested to be identified as such, and the court failed to exercise its discretion and balance the victim's privacy interests against the potential for prejudice from identifying her as such.

Section 293.5, subdivision (a) provides that upon the request of an alleged victim of a sex offense, the trial court "may order the identity of the alleged victim . . . during all proceedings to be either Jane Doe or John Doe, if the court finds that such an order is

reasonably necessary to protect the privacy of the person and will not unduly prejudice the prosecution or the defense.”

Here, defendant asserts the error lies in the court’s apparent mistaken belief that the order was mandatory, assuming that was the victim’s wishes. The record shows that defense counsel asked the court whether it believed it lacked discretion not to identify the victim as “Jane Doe,” or whether a balancing test should be applied. The court responded that the choice was the victim’s, and the court’s. Defendant argues this demonstrates the court did understand that it had discretion to determine if it was appropriate for the victim to be identified as “Jane Doe.” The court’s failure to properly exercise discretion in this case, defendant asserts, is grounds for reversal.

While the record shows that the court did not appear to balance the necessity to protect the victim’s privacy with the potential of prejudice to the defendant, such failure did not prejudice defendant during his trial. In particular, the verdict in this case demonstrates that the jury was able to fairly evaluate the evidence, acquitting defendant of the sexual offenses of assault with intent to commit rape and attempted rape, and convicting him of assault with force likely to cause great bodily injury. Where a jury acquits a defendant of some charges, and convicts on others, it shows an ability to consider each count on the evidence presented and nothing more. (See, e.g., *People v. Smith* (2003) 30 Cal.4th 581, 617.) We find no prejudice by the court’s identification of the victim as “Jane Doe” in this case.

### ***Prosecutorial Misconduct***

Defendant asserts the prosecutor committed misconduct during his closing argument and rebuttal; however, the issue of prosecutorial misconduct was not raised in the trial court.

“As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an

assignment of misconduct and requested that the jury be admonished to disregard the impropriety.” (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Here, defense counsel did not object to any of the arguments that defendant relies on as the basis for his claim of prosecutorial misconduct nor did he ask the court to admonish the jury to disregard the argument. Defendant argues on appeal that his counsel was ineffective for failing to object to the prosecutor’s statements during closing argument and rebuttal.

“Prosecutorial misconduct implies a deceptive or reprehensible method of persuading the court or jury.” (*People v. Price* (1991) 1 Cal.4th 324, 448, superseded by statute on other grounds as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1161-1165.) Although prosecutors are given “ ‘wide latitude’ ” in arguing their cases, they nevertheless “are held to an elevated standard of conduct.” (*People v. Hill* (1998) 17 Cal.4th 800, 819 (*Hill*).) The imposition of this higher standard is justified by their “unique function . . . in representing the interests, and in exercising the sovereign power, of the state.” (*Id.* at p. 820.)

To warrant reversal, the challenged conduct must be prejudicial. “What is crucial to a claim of prosecutorial misconduct is . . . the potential injury to the defendant.” (*People v. Benson* (1990) 52 Cal.3d 754, 793.) When the claim “focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.” (*People v. Samayoa, supra*, 15 Cal.4th at p. 841.) To answer that question, we examine the prosecutor’s statement in the context of the whole record, including arguments and instructions. (*Hill, supra*, 17 Cal.4th at p. 832.) “In conducting this inquiry, we ‘do not lightly infer’ that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements.” (*People v. Frye* (1998) 18 Cal.4th 894, 970, overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

As a matter of federal constitutional law, a prosecutor's behavior constitutes prejudicial misconduct when it is “ ‘ “ ‘ “so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.” ’ ” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves “ ‘ “the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.” ’ ” [Citation.]’ [Citation.]” (*Hill, supra*, 17 Cal.4th at p. 819.) Thus, for example, federal constitutional error may be found where a pervasive pattern of misconduct “threatened defendant’s right to a fair trial.” (*Id.* at p. 838.) By contrast, there would be “no error of constitutional dimension” where, for example, “inaccuracies in the [prosecution] witness’s testimony were not material errors ‘in the sense that [their] suppression undermines confidence in the outcome of the trial.’ ” (*People v. Padilla* (1995) 11 Cal.4th 891, 929, overruled on other grounds in *Hill, supra*, 17 Cal.4th at p. 823, fn. 1.)

### ***Defendant’s Statements After Arrest***

During closing argument, the prosecutor made reference to statements defendant made following his arrest. The prosecutor stated: “So he’s taken to the police station. He’s Mirandized. ‘You have the right to remain silent. You have the right to an attorney. Whatever you say can be used against you.’ What is the first word out of his mouth? ‘What am I being charged with?’ It’s not, ‘Hey officer, yeah, I know. You’re reading my *Miranda* rights. I just want to tell you that woman was just *whacky*. She did this terrible thing.’ No. His first question is, ‘What are my charges?’ because he knows what he did.

Defendant asserts the prosecutor’s reference to his statements constituted federal constitutional error under *Doyle v. Ohio* (1976) 426 U.S. 610, in which the United States Supreme Court held that “the use for impeachment purposes of [a defendant’s] silence, at the time of arrest and after receiving *Miranda* warnings, violate[s] the Due Process Clause of the Fourteenth Amendment.” (*Id.* at p. 619, fn. omitted.) “Official advice

pursuant to *Miranda* of a person's right to remain silent carries with it an implicit assurance that 'silence will carry no penalty.' ” (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1525 (*Lopez*), citing *Doyle*, at p. 618.) This rule “rests on ‘the fundamental unfairness of implicitly assuring a suspect that his [or her] silence will not be used against him [or her] and then using [the defendant's] silence to impeach an explanation subsequently offered at trial.’ ” (*Wainwright v. Greenfield* (1986) 474 U.S. 284, 291.)

Defendant asserts his situation is similar to that in *Lopez, supra*, in which this court held the prosecutor committed misconduct by commenting on statements made by the defendant after he had been given his *Miranda* warnings. In *Lopez*, the prosecutor focused on the defendant's statement to investigating officers of, “Fuck you. I want to talk to my lawyer,” in response to their question of why he had resisted arrest. (*Lopez, supra*, 129 Cal.App.4th at p. 1519.) At trial, the prosecutor argued that the first sentence constituted an adoptive admission. (*Id.* at p. 1525.) On appeal, the defendant argued that these two sentences were “inextricably intertwined” and that both constituted an invocation of his right to counsel. (*Id.* at p. 1526.) Consequently, he asserted, even this first sentence should not have been called to the jury's attention. (*Ibid.*)

This court found the prosecutor committed misconduct by using defendant's first statement as an adoptive admission stating, “this particular curse must be put in its context. It occurred after defendant had been given a *Miranda* admonition and immediately after the officer asked why defendant had resisted the officers. In this context, defendant's entire response must be considered together as a refusal to answer this question as well as an invocation of his right to counsel. We see nothing ambiguous or equivocal about this statement. . . . [¶] In this case, the jury should not have been asked to consider defendant's colorful invocation of his right to counsel as an adoptive admission.” (*Lopez, supra*, 129 Cal.App.4th at p. 1527.)

Defendant's comments in this case after being given his *Miranda* warnings are not similar to those in *Lopez*, because they were not in response to any question, and did not serve to invoke any constitutional right. After being given his *Miranda* rights, defendant responded with, "What am I being charged with?" This statement, and defendant's questions that followed were freely and voluntarily given, and their use by the prosecutor did not violate defendant's constitutional rights under *Doyle*. (See, e.g., *People v. Hill* (1980) 110 Cal.App.3d 937, 943 ["Once a defendant is properly advised of his *Miranda* rights and chooses to make a statement, he may be cross-examined on it.].)

Moreover, the trial court ruled in limine that defendant's interaction with the police and his statements to them were admissible during trial. Relying on the court's in limine ruling, the prosecutor's use of the statements in closing argument did not rise to the level of misconduct, because it was "a deceptive or reprehensible method of persuading the court or jury." (*People v. Price, supra*, 1 Cal.4th at p. 448.)

### ***Defense Counsel's Characterization of Doe's Injuries***

Defendant asserts on appeal that the prosecutor committed misconduct in asking the jury to reject defense counsel's characterization of Doe's injuries because he was not the one that suffered the beating. Specifically, the prosecutor stated at trial: "Now there's [an] allegation, you know, no broken bones and so forth. Well it's easy for counsel to say. She was the one that suffered the beating. She was the one that had to receive the blows unjustifiably. She was the one where his weight of his body and strength of his arms landing blows. To sort of dismiss it and go, well, it's not a big deal, that's easy to say unless you're the one being beaten as Jane Doe was."

Defendant argues the prosecutor's argument was an improper use of a "Golden Rule" argument, wherein the prosecutor asks the jury to put itself in the position of the victim and imagine what the victim experienced. (See, e.g., *People v. Vance* (2010) 188 Cal.App.4th 1182) However, the prosecutor's argument here did not improperly ask the

members of the jury to consider themselves in the position of the victim; rather, it attacked defense counsel's minimization and characterization of the victim's injuries. These arguments not constitute prosecutorial misconduct.

In addition, defendant asserts on appeal that the prosecutor disparaged defense counsel for being insensitive to the victim's injuries in the rebuttal. Specifically, during closing argument, defense counsel attacked Doe's credibility as a witness against defendant by stating that Doe embellished the accusations against defendant, she was a drug addict, and should not be believed because she was unreliable. In addition, counsel argued Doe had not suffered any significant injuries during the altercation. In response, the prosecutor stated in rebuttal: "Well, no surprises here. Blame the victim. Dehumanize the victim. Counsel can make you not like the victim, make them seem less worthy. . . . I mean, isn't that—in terms of prejudice, isn't that how you do that? I don't like this race; therefore, I can do things to them. . . . Any why can I do that to a person and justify that? Because they're not as human as I am. That's all it comes down to. The desire to attack the victim, dehumanize her, dehumanize Ms. Lopez. [¶] Yes, they are poor. Yes, they don't have any political power. They don't live in a nice neighborhood. Yes, you can go after them. What about your drug problem? What about alcohol? In order to disparage them so that you won't feel they're worthy of protection."

Defendant asserts on appeal that the prosecutor's arguments were misconduct, because they defamed the defense attorney. "A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel. [Citations.] 'An attack on the defendant's attorney can be [as] seriously prejudicial as an attack on the defendant himself, and, in view of the accepted doctrines of legal ethics and decorum [citation], it is never excusable.' " (*Hill, supra*, 17 Cal.4th at p. 832.)

The prosecutor's statements that defense counsel was dehumanizing the victim did not cause aspersions on defense counsel, nor did they attack counsel's integrity. Rather,

the arguments attacked defense counsel's arguments regarding Doe's drug abuse and lack of credibility. None of the prosecutor's arguments attacked defense counsel's character.

We do not find any of the arguments in closing and rebuttal to be prosecutorial misconduct.<sup>3</sup> The prosecutor did not employ "deceptive or reprehensible method[s]" to persuade the jury in this case. (*People v. Price, supra*, 1 Cal.4th at p. 448.)

### ***Cumulative Error***

Defendant argues that the cumulative effect of the above discussed trial errors deprived of him of his constitutional right to a fair trial, and therefore the jury's finding must be reversed. The California Supreme Court has instructed that "a series of trial errors though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*Hill, supra*, 17 Cal.4th at p. 844.) In the present case, we have determined that none of the above claimed actions on the part of the court were prejudicial errors.

Moreover, the cumulative effect of the claimed errors is insufficient to rise to the level of reversible and prejudicial error. Therefore, we must reject defendant's contention of cumulative error.

### ***Strike Conviction***

Defendant asserts the trial court abused its discretion when it refused to dismiss defendant's prior strike conviction.

Section 1385, subdivision (a) provides in part: "The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed." Section 1385 may be used to dismiss individual counts in accusatory pleadings, sentencing enhancements, allegations that the defendant has suffered a prior conviction, and allegations that the defendant has

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<sup>3</sup> Because we find no prosecutorial misconduct in this case, we do not address defendant's argument that he was denied effective assistance of counsel by his attorney's failure to object to the prosecutor's arguments during closing and rebuttal.

suffered a prior “ ‘strike’ ” within the meaning of the “Three Strikes” law. (*In re Varnell* (2003) 30 Cal.4th 1132, 1134.) Section 1385, subdivision (c)(1) authorizes the trial court to strike or dismiss an enhancement, or to “instead strike the additional punishment for that enhancement in the furtherance of justice.”

“Although section 1385 provides that a dismissal ‘in furtherance of justice’ may be ordered either on the motion of the district attorney, or on the court’s motion, a defendant may invite the court to exercise its power by an application to strike a count or allegation of an accusatory pleading, and the court must consider evidence offered by the defendant in support of his assertion that the dismissal would be in furtherance of justice.” (*Rockwell v. Superior Court* (1976) 18 Cal.3d 420, 441-442; see also *People v. Superior Court (Flores)* (1989) 214 Cal.App.3d 127, 137 [although section 1385 does not provide for a formal defense motion, defendant may ask the court to exercise its discretion under section 1385].)

In this case, defense counsel asked the court at the sentencing hearing to dismiss the defendant’s prior strike conviction in the interests of justice. The court refused defendant’s request. We review the trial court’s decision not to dismiss or strike a sentencing allegation under section 1385 for an abuse of discretion. (*People v. Camony* (2004) 33 Cal.4th 367, 373-375 (*Carmony*) [refusal to strike “strike” prior allegations].) A trial court will only abuse its discretion in failing to strike a sentencing allegation in limited circumstances, including “ ‘where the trial court was not “aware of its discretion” to dismiss [citation] or where the court considered impermissible factors in declining to dismiss [citation].’ ” (*Id.* at p. 378 (conc. opn. of Moreno, J.).)

To establish an abuse of discretion in denying his motion to strike, defendant has the burden “ ‘to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a

particular sentence will not be set aside on review.’ [Citation.] Concomitantly, ‘[a] decision will not be reversed merely because reasonable people might disagree. “An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.” ’ ” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978; see also *Carmony*, *supra*, 33 Cal.4th at pp. 376-377.)

Defendant argues that the trial court abused its discretion by refusing to dismiss his prior strike conviction. The basis for his argument is the fact that the court represented to defendant before trial that it would be willing to consider dismissing the strike on the first day of trial if defendant pleaded guilty. Defendant asserts there is no reason for the court to change its mind and refuse to dismiss the strike, other than the fact that defendant proceeded to trial. Defendant also contends the prosecutor misrepresented at the sentencing hearing that defendant had a prior conviction for forcible rape, when in fact defendant’s prior was for unlawful sexual intercourse.

In our view, the court did not abuse its discretion when it refused to dismiss defendant’s strike conviction. The court considered the fact that defendant was in his mid-fifties and was on parole when the crime was committed in this case. Defendant had also suffered four prior felonies and 24 misdemeanors, and had violated parole 12 times. Given defendant’s recidivism, there was no compelling reason for the court to dismiss his prior strike conviction. We find no abuse of discretion.

#### **DISPOSITION**

The judgment is affirmed. The petition for habeas corpus (H037901) is denied.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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ELIA, J.